SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UFCW & EMPLOYERS BENEFIT TRUST, et al., Plaintiff, vs. SUTTER HEALTH, ET AL., Defendants.	Case No. CGC – 14-538451 ORDER GRANTING UEBT'S MOTION FOR DISCOVERY SANCTIONS

In 2016, I directed that discovery could extend back to 2002. Order Granting in Part and Denying in Part Plaintiff Motion to Compel (entered May 5, 2016) at 4 n.3. A few months later in July 2016—and about a year after the fact—Sutter notified UEBT that certain documents had been destroyed: in 2015, Melissa Brendt, Sutter's Vice President and Chief Contracting Officer of the Managed Care department, and Daniela Almeida, in-house counsel for Sutter, had authorized Ms. Brendt's executive assistant, Sina Santagata, to destroy 192 boxes of Managed Care department documents containing 10 years' worth of department documents going back to 1995.

UEBT now seeks sanctions, including issue and evidentiary sanctions, against Sutter. I heard argument on October 27, 2017, and allowed the parties each to file a five page supplemental brief, due November 3, 2017. The matter was then submitted.

Papers Stricken

After almost two hours of argument, I allowed "up to five pages" for supplemental memoranda. I did not allow any further evidence. Transcript of Hearing (Tr.) at 59. Plaintiff UEBT filed 6 pages; Sutter filed a total of *22 pages*[1]—as well as an *additional* stack of supplemental declarations, that is, evidence as to which plaintiffs have had no opportunity to oppose or comment on.

In the future I will either strike filing which are longer than statute, rules of court, or orders permit, or I may just ignore surplus pages. I will for the pending motion consider both supplemental memoranda but I strike all Sutter's supplemental evidence, i.e. declarations by Zeng, Martinez, Carriere, Grimes, and Zertuche.[2]

Factual Backdrop

The circumstances of the document destruction were, to put it as mildly as I can, decidedly odd, and Sutter has not explained them except to argue it was all a mistake. Sutter says the decision to destroy 192 boxes was made on the spur of the moment during an interruption in a meeting (Opposition at 5), and at argument Sutter compared the episode to an automated process (see discussion of auto-delete, below).

But the record shows that Sutter's conduct was more than just an inadvertent error. Ms. Brendt personally selected the 10-year timeframe for the boxes to be destroyed. Reese Decl. Ex. 4 at 50:9–24. The actual destruction date listed for all of the boxes was January 1, 2035. *Id.* at 82:1–5; Reese Decl. Ex. 8. That destruction date is the date that Records Management is to contact the applicable department for permission to discard the record. Carriere Decl. ¶ 3.

[1] Only 7 of them were paginated as part of a memorandum, the rest were appended to the memo.

[2] It is not clear the declarations comply with C.C.P. § 2015.5, as they are sworn under penalty of perjury under the laws of the United States, as opposed to the State of California. This sort of problem can be fatal. *ViaView, Inc. v. Retzlaff*, 1 Cal.App.5th 198, 217 (2016). For purposes of this motion I do not disregard them for that reason.

Despite this, Records contacted Managed Care regarding destruction in 2015, twenty years early. *Id.* ¶ 5. Contrary to Sutter's argument that Sutter engaged in what was essentially an inadvertent 'auto delete' destruction (Tr. at 41), this was not a routine destruction authorization: Ms. Santagata testified that in her 17 years at Sutter, she was not aware of any other time when the Managed Care department authorized destruction of records in storage. Reese Decl. Ex. 4 at 83:2–7, 83:22–84:9.[3]

In order for Records to dispose of any box, a certification is required to the effect that the documents are not subject to a current legal hold. Carriere Decl. ¶ 7. Ms. Santagata confirmed that she would not have authorized destruction unless she had conferred with both Ms. Brendt and the legal department (specifically, Ms. Almeida). Reese Reply Decl. Ex. 1 at 55:12–56:11. And Ms. Santagata had more than one discussion with Ms. Brendt and the legal department about the boxes. *Id.* at 56:3–11, 98:24–99:2, 103:12–16, 171:2–7. These are the people who knew of this litigation,[4] and knew of the litigation hold which covered documents back to 2002.[5] Ms. Santagata's email to Ms. Brendt after the boxes were destroyed is particularly noteworthy. In the email marked "confidential" she wrote: "I've pushed the button…if someone is in need of a box between 3/15/95 & 11/23/05…I'm running and hiding. . . . . 'Fingers crossed' that I haven't authorized something the FTC will hunt me down for." Reese Decl. Ex. 15. at

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[3] At argument I queried Sutter's counsel whether the Managed Care department had previously or on any routine basis (e.g., every year), deleted documents. Tr. 41:8-12. I did not receive an answer to this. I reject Sutter's attempts to argue that this was indeed routine. Compare Ex A to Sutter's Supplemental Memorandum dated November 3, 2017 (p. 2, 3d row). Sutter also surprisingly tries to devalue the conclusion that there was a litigation hold and that the destruction was authorized by people who knew about it (id., Ex A 4th row: "Partially correct") and that the FTC references did not indicate an awareness that the documents related to antitrust concerns (id., at p.3 1st row). I do not address all of this Exhibit A here—much of which is actually legal argument—but I certainly reject these suggestions.

[4] Ms. Almeida, as in-house counsel, was responsible for managing litigation, surely knew about the litigation hold and Sutter's ongoing discovery obligations, was made aware of the boxes through conversations with Ms. Santagata, and still authorized their destruction. UEBT had already served its first set of document requests in 2014, and Sutter was then under a duty to preserve evidence.

[5] Tr. 19; Alameda Decl. signed 9 October 2017 at ¶ 3.

DEF000108220. This does not suggest that the destruction of boxes was just a routine records audit, but the opposite. Sutter does not address this email in its opposition. While Carriere does suggest that documents are indeed sometimes destroyed short of the document destruction date (here 2035) (Carriere Decl. dated October 9, 2017), there is no good explanation for the specific and unusual destruction here. Sutter says the FTC reference was just a 'joke' and Ms. Santagata testified that she was only being sarcastic and said, incredibly, she was unsure what FTC stood for or whether at the time of the email she meant the Federal Trade Commission. Reese Decl. Ex. 4 at 135, 141, 142. But there are infinite topics for jokes, and the choice of this one is strong evidence in UEBT's favor. I discuss this below in context.

Discussion

The moving papers rely on C.C.P. § 2023.030 ("misuse of the discovery process"), and Evid C. § 413 which contemplates a jury instruction if the trier of fact finds suppression of evidence. See also CACI 204. The motion does not invoke the court's inherent authority to ensure, e.g., fairness at trial by excluding witnesses or other sanctions. Compare *Cottini v. Enloe Medical Center,* 226 Cal.App.4th 401, 426 (2014); Weil & Brown, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 8:1908 (Rutter Group 2017) ("RUTTER"). If there is misuse of the discovery process, I have "broad discretion" as to remedies—as always, within limits. *Lopez v. Watchtower Bible and Tract Society of New York, Inc.*, 246 Cal.App.4th 566, 604 (2016) (reversing for abuse of discretion).

UEBT does not seek money sanctions. It seeks various combinations[6] of orders requiring recovery of backup tapes; evidence or perhaps issue preclusion; and adverse jury instructions.

Generally, non-monetary sanctions require a showing that a party disobeyed a court order compelling discovery. RUTTER ¶ 8:10. This is not the situation here, as both sides agree. Sutter

[6] UEBT made varying proposals with the moving papers, at argument, and then with the supplemental filings.

contends that plaintiffs thus may not seek non-monetary sanctions. Opposition at 14. But even Sutter's central authority, *New Albertsons, Inc. v. Superior Court,* 68 Cal.App.4th 1403 (2008) notes exceptions, such as for "a pattern of willful discovery abuse," id. at 1426 (quoting cases), where the behavior "is sufficiently egregious" or if "it is reasonably clear that obtaining such an order would be futile." Id. at 1436.

Materiality

"[A] party moving for discovery sanctions based on the spoliation of evidence must make an initial prima facie showing that the responding party in fact destroyed evidence that had a substantial probability of damaging the moving party's ability to establish an essential element of his claim or defense." *Williams v. Russ*, 167 Cal. App. 4th 1215, 1227 (2008).

In April 2014, UEBT served its first set of Requests for Production of Documents, which included requests targeting the contracting practices that Sutter initiated in the early 2000s. MPA at 3. These included "[a]ll documents relating to any 'All-or-Nothing Terms'" and documents relating to any "strategy regarding[] Sutter's pricing," documents regarding Sutter's market share, and documents "relating to any governmental investigation relating to any agreement with any Network Vendors or Sutter's compliance with antitrust or unfair competition laws." Reese Decl. Ex. 2 Definition 12 and Requests 3, 6, 8, 12, 16. The papers in issue now were likely material, although because they have been destroyed we will never know for sure, and UEBT cannot reasonably be expected to indisputably establish their materiality (or, hence, prejudice). But the evidence favors UEBT: the documents are from the managed care department, they cover a relevant time period when Sutter was assertedly implementing its alleged anticompetitive policies and the missing papers (e.g. marginalia on papers used during

contract negotiations[7]), and probably reflected Sutter's then current approaches to that implementation as well as its purposes and intent. When Sutter decided to store these papers and discard others, I infer it did so because of their relevance. Tr. 17. And of course Sutter has put the business justification and intent for using certain contract provisions into issue. Corrected Joint Case Management Statement (filed Sept. 5, 2017) at 8–9.

UEBT pinpoints 94 boxes that it believes contained relevant documents. Reese Decl. Ex. 19 (last three pages, unnumbered). Eleven of those boxes contain pre-2002 documents. UEBT contends that this information is still discoverable, as the Court has not ruled that 2002 is a hard cut-off date for discovery, as the Order left open the possibility that documents earlier than 2002 may be retrieved. Order (entered May 5, 2016) at 4 n.3.

Prejudice

When the moving party has made an initial prima facie showing that destruction of the evidence had a substantial probability of damaging the moving party's ability to establish an essential element of his claim or defense, the burden then shifts to the responding party to demonstrate that there is no prejudice. *Williams*, 167 Cal. App. 4th at 1226–27.

I reject Sutter's arguments. The quantity of other responsive documents produced has no bearing on whether relevant, material, discoverable evidence was preserved and produced; the loss of evidence is not remedied by production of *other* documents. Sutter concedes that it only saved emails its team members thought important to save. Without the missing emails or handwritten notes, I and UEBT would only be taking Sutter at its word that those documents are not important or fully captured and preserved elsewhere, a statement Sutter cannot credibly make. Sutter has not shown that UEBT was not prejudiced by the destruction of the documents.

[7] UEBT identifies handwritten notes regarding negotiations with Network Vendors, Managed Care meeting agenda notes, files and notes from negotiations with Network Vendors, presentations, and contracting strategy. MPA at 7–8.

Futility & Pattern of Abuse

Obtaining a court order to produce the boxes would have been futile. Discovery was not permitted to reach back to 2002 until the May 2016 Court Order. By then, the boxes had already been destroyed. UEBT was not aware of the destruction until July 2016. MPA at 14. But this is probably not sort of "futility" that *New Albertsons* had in mind, which seems to be the futility of issuing a predicate order compelling discovery when it is clear that the items sought don't exist. 168 Cal.App.4th at 1428 (citing *Do It Urself*).

Nor does UEBT suggest this motion is brought in the context of a pattern of discovery abuse. Hence I turn to whether the conduct is "sufficiently egregious".

Sufficiently Egregious & Intent

New Albertsons is good authority for the rule that that destroying evidence "with the intention of preventing its use in litigation" is sufficiently egregious. 168 Cal. App. 4th at 1434. But while it is clear that, as in *New Albertsons*, a specific intent to prevent the use of the information is required for terminating sanctions, see also *Williams v. Russ*, 167 Cal.App.4th 1215, 1223 (2008), it is not clear whether lesser nonmonetary sanctions also require this level of scienter. For example, courts may be authorized to even the playing field when documents are intentionally deleted but the intention isn't specifically to deprive the other side of information useful or needed for the litigation. RUTTER ¶ 8:2220.

Here, I find that the destruction was intentional in the sense that Sutter positively ordered the destruction. I also find that the destruction was done knowing that the evidence was relevant to antitrust issues; this is based primarily on Santagata's email and the role—and knowledge of this litigation—of Ms. Brendt and Ms. Almeida. It is less clear that Sutter's representatives specifically intended to deprive UEBT of evidence in this case; the most generous interpretation

to Sutter is that it was grossly reckless, and I find that is sufficient to impose what I will term compensatory sanctions, that is, sanctions designed to remedy the problems Sutter has caused.

A few words on these compensatory sanctions. The usual point of sanctions, demonstrated in *Lopez*, 246 Cal.App.4th 566, is to force adherence to the obligations of the discovery code. That is why we have the classic pattern of incremental sanctions, beginning with monetary sanctions, escalating to non-monetary sanctions including, finally, terminating sanctions. E.g., *Padron v. Watchtower Bible And Tract Society Of New York, Inc.*, __Cal.App.4th__ (Nov. 9, 2017, No. D070723) 2017 WL 5181618, at *8, *10. That pattern is not pertinent here because no order of mine can compel Sutter to produce that which has been destroyed. So (assuming discovery abuse) the only purpose that can be served is to place UEBT in the position it would have been in had the documents not been destroyed. This involves notions of proportionality, that is, I am required to avoid providing a windfall to UEBT on the one hand (RUTTER ¶ 8:2216), and to do what can be done so as to not let Sutter profit from its acts.

> Discovery sanctions are intended to remedy discovery abuse, not to punish the offending party. Accordingly, sanctions should be tailored to serve that remedial purpose, should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery, and should be proportionate to the offending party's misconduct. (*McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 210–212, 31 Cal.Rptr.2d 292.)

Williams, 167 Cal.App.4th at 1223. See also *NewLife Sciences v. Weinstock,* 197 Cal.App.4th 676, 689 n.10 (2011).

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Appropriate Sanctions

UEBT now seeks backup tapes and adverse jury instructions. I take these in order.

Tapes. As I understand it, UEBT does not suggest that the destroyed documents are on the backup tapes, but rather that production of the tapes, such as of emails, will ameliorate the impact of the destruction.[8]

UEBT's proposed order,[9] requiring *all* tapes to be produced from 1995-2008, is grossly overbroad. The litigation hold Sutter put into effect, which UEBT has not criticized, went back to 2002, and there is no good showing that pertinent documents past 2005 were destroyed.[10] Sutter notes that UEBT hasn't asked for pre-2002 documents. Sutter Supplemental Brief at 6. Thus the relevant period is 2002-2005. Further, UEBT's papers only suggest that backups of the managed care department would be useful. Those are the constraints on the universe of backup tapes which Sutter should now examine.[11]

This sanction does not require Sutter to restore 10,000 tapes. As UEBT notes there may be at most about 100 tapes in play. UEBT Reply at 8 & n.8. As I understand it, indices of the tapes must be prepared from which a reasonable estimate of the pertinent tapes may be made. Although at the hearing I asked Sutter to provide me estimates of the burdens in undertaking this task, in order for me to evaluate UEBT's suggestion that the production be ordered in 45 days (Tr. 59), I did not see such a discussion in Sutter's supplemental papers. Sutter is directed to provide me a declaration from either in-house Sutter personnel or an outside technology

[8] UEBT also suggests that some of the destroyed documents are print-outs of emails which might be found in the backup tapes. UEBT Reply at 8:10-13.

[9] As noted, UEBT had proposed different sorts of relief. Here I refer to the proposal last provided, which accompanied UEBT's final supplemental briefing.

[10] This may be why UEBT originally suggested that Sutter be ordered to restore back-up tapes that cover electronic documents from pre-2005, when the email system changed. MPA at 13.

[11] Sutter tells me it is unnecessary for me to order the production or re-creation of documents because it is "already committed to do so." Ex A to Sutter's Supplemental Memorandum dated November 3, 2017 (p. 4, first full paragraph). The commitment is a bit vague; the better part of valor now is to order the production.

company briefly explaining the minimum time required to produce pertinent documents from these backup tapes, in order to allow me to set a reasonable production deadline. This declaration must be provided not later than November 27, 2017, and UEBT may comment in a document of not more than 6 pages by December 11, 2017.[12]

Jury Instructions. At argument and in their papers, both sides suggested I not now craft an adverse jury instruction.[13] But I do now note that I reject most of UEBT's suggestions. Its latest proposal is to impose something pretty close to issue sanctions (Sutter barred from contesting anticompetitive intent or purpose) unless Sutter can prove it has produced every document ever created concerning its "consideration, debate, purpose, analysis and business strategy regarding the challenged contract terms and policies" among other things. Proposed Order. No one thinks Sutter could prove this even if the document destruction the subject of this motion had not occurred much less after the destruction.[14] Thus this is in essence a request for an issue sanction. And as such, it is grossly disproportionate to the offense: It is almost a directed verdict on liability, because if UEBT is right that it need only prove *ether* anticompetitive effect *or* purpose (Tr. 10:1-8) the instruction is decisive; whereas Sutter's malfeasance is not such as to effectively preclude UEBT from proof of effect—or intent. The appropriate instruction is probably CACI 204.[15] We will discuss this further after—as the parties have suggested—discovery is closed. Evid. C. § 413; *Cedars-Sinai Medical Center v. Superior Court,* 18 Cal.4th 1, 11 (1998).

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[12] Due to my calendar the parties should not expect a further order on this issue until after mid-December, but Sutter should nevertheless promptly undertake the production directed here.

[13] Tr. 27-28 (UEBT). Sutter's Supplemental brief dated November 3, 2017 at 6 (premature to order instruction).

[14] E.g., UEBT's opening memorandum at 7:17-18; 11:2-3.

[15] Sutter referred to a BAJI instruction in its papers. The parties should know that given the imprimatur of the Judicial Council I prefer CACI over BAJI, that a mixture of BAJI and CACI in instructions on related issues can be confusing, and that I usually require some further authority to use BAJI when there is a CACI instruction on point.

Conclusion

All declarations filed by Sutter in connection with its November 3, 2017 Supplemental Brief are stricken. Sutter must not later than November 27, 2017 provide a declaration on the time needed to produce discovery documents from backups pertaining to (a) the period 2002-2005 and (b) the Managed Care department. UEBT may comment on that declaration in a document of not more than 6 pages by December 11, 2017. After discovery closes, UEBT may renew its request for an adverse jury instruction.

Dated: November 13, 2017

Curtis E.A. Karnow
Judge Of The Superior Court

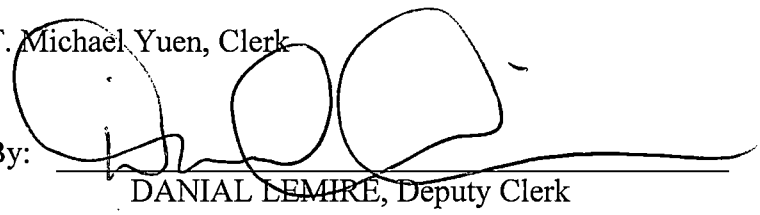
CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On NOV 14 2017 , I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: NOV 14 2017

T. Michael Yuen, Clerk

By: 
DANIAL LEMIRE, Deputy Clerk